

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 03-32269-DHW

Chapter 13

CAROLYN ROLLAN THOMAS
RICKY A. THOMAS,

Debtors.

MEMORANDUM OPINION

Carolyn R. Thomas, a joint debtor in this chapter 13 case, wrote a letter to the court on February 2, 2004 complaining about the legal representation received by the debtors from their former counsel Gary A.C. Backus of the law firm of Backus & Gil, LLC.¹ The court forwarded a copy of the debtor's letter to the bankruptcy administrator for this district.

The bankruptcy administrator filed a motion to examine the debtors' transactions with Mr. Backus. An evidentiary hearing on the motion was held April 5, 2004.

Jurisdiction

The court's jurisdiction derives from 28 U.S.C. § 1334 and the United States District Court for the Middle District of Alabama's general order of reference of title 11 matters to the bankruptcy court. Further, this is a core proceeding under 28 U.S.C. § 157 extending the court's jurisdiction to the entry of a final order or judgment.

Findings of Fact

Ricky A. and Carolyn R. Thomas have filed two chapter 13 petitions for relief in this court. The first case (No. 02-32293) was filed on August 2, 2002.

¹ W. Gail Hughes entered an appearance as attorney for the debtors on December 31, 2003. On January 20, 2004, Mr. Backus moved to withdraw as the debtors' attorney. The court granted the motion on March 19, 2004.

Before the case was filed, the debtors learned that Greentree was planning to repossess their mobile home. They contacted Mr. Backus by phone.² This telephone conference was the only contact they had with him prior to the 11 U.S.C. § 341 meeting of creditors. Mr. Backus sent the petition, lists, schedules, and statements to the debtors in blank via facsimile transmission requesting their signature.³ The debtors signed the blank documents and returned them to Mr. Backus.

The debtors' plan was confirmed on October 10, 2002. The plan required the debtors to pay the trustee \$111 each week. Under the plan, Greentree's arrearage claim would be paid through the trustee, and postpetition payments to Greentree would be made directly by the debtors. The plan provided for the surrender of a car and boat and 0% to unsecured creditors.

On October 8, 2002, just prior to entry of the order of confirmation, Greentree a/k/a Conseco Finance Serving Corporation filed a motion for relief from the automatic stay to enforce its security interest in the mobile home. The creditor alleged that the debtors had failed to make their regular monthly payments from September 2002. The postpetition arrearage was \$1,286.04 plus attorney fees and costs.

A consent order entered on November 7, 2002 conditionally denying the motion and modifying the plan to cure the arrearage through the chapter 13 trustee. The order increased the debtors' payments to the trustee to \$120 per week to accommodate the inclusion of the arrearage. Finally, the order provided for termination of the stay without further order of the court in the event the debtors defaulted in direct payments (and remained in default for a period of 30

² The debtors do not own the land on which the mobile home is situated; Carolyn Thomas's mother owns the land.

³ The court was asked by the bankruptcy administrator to take judicial notice of the response to Question 1 of the Statement of Financial Affairs. The question requires the debtors to state their gross income from employment, trade, or profession for the last two years. The response marked is "none," which is untrue in that both debtors had earned income within the prior two years.

days) from the December 2002 installment forward.

By June 2003 the debtors encountered more trouble with Greentree. Greentree again planned to repossess the mobile home, contending that the debtors had defaulted and the stay had lifted under the terms of the November 2002 consent order.

Mrs. Thomas contends that the direct payments were not technically in default. Rather, she contends that the default was the result of Greentree's using her intended installment payments to purchase unnecessary single-interest insurance coverage. The insurance was unnecessary, according to Mrs. Thomas, because private insurance was in place protecting Greentree's interest.

Mrs. Thomas' theory is belied, in part, because the evidence shows that she had in fact defaulted by failing to timely pay the March 2003 installment. The third page of Defendant's Exhibit 3 is a copy of Mrs. Thomas' money order dated April 20, 2003 payable to Consecro for \$938.44. Mrs. Thomas acknowledges that this money order was for the March and April installment payments. It follows that if the payment for March was paid on April 20, then the March payment default would have triggered the termination of the automatic stay under the November 2002 consent order.

In the face of Greentree's pending repossession in June 2003, Mr. Backus advised the debtors to voluntarily dismiss the chapter 13 case and to either file another case or attempt to reach an agreement with Greentree. On July 23, 2003, the debtors moved to dismiss their chapter 13 case. The order of dismissal entered the following day. All the while, the debtors felt that the dismissal of the case was unnecessary and could be avoided if only their attorney would address the insurance premium problem.

On July 25, 2003, within twenty-four hours after dismissal of the first case, the debtors filed the second chapter 13 case (No. 03-32269). The plan in the second case requires the debtors to pay the trustee \$140 each week. As with the first case, the plan provides for Greentree's arrearage claim to be paid through the trustee and for postpetition payments to be made directly by the debtors. Unlike the first plan, the second plan provides for full payment of allowed

unsecured claims.⁴

On November 24, 2003, Greentree filed a motion for relief from the automatic stay alleging that the debtors had defaulted in their direct payments for part of October as well as November resulting in an arrearage of \$919.30 plus fees and costs. Greentree's motion was set for hearing on December 15, 2003 but was continued at the request of the parties to January 12, 2004.⁵

As in the first case, Mrs. Thomas contends that she is current in direct payments to Greentree. She contends that the alleged default arose by Greentree's diversion of her payments to purchase single-interest insurance coverage. Again, Mrs. Thomas contends that the purchase of insurance by Greentree was unnecessary because she maintains private insurance covering Greentree's interest. The Thomas' home, however, was admittedly uninsured for a two-week period ending 5 days after the second chapter 13 case was filed on July 25, 2003.⁶

Believing that the Backus & Gil lawyers were not effectively addressing the issue, the Thomases changed lawyers prior to the hearing. Interestingly, with the aid of new counsel, the debtors agreed to the entry of a consent order on Greentree's stay motion providing for the curing of a postpetition default totaling almost \$1,000.00.

During the second case, the debtors paid \$120 to Backus & Gil toward both filing fees and plan payments. Backus & Gil duly paid these funds to the clerk of this court or the chapter 13 trustee via two checks drawn on the law

⁴ The debtors filed the second case proposing to pay 0% to unsecured creditors. However, upon objection by the trustee, the debtors modified the plan to pay unsecured creditors 100%.

⁵ Prior to the hearing, W. Gail Hughes entered an appearance on behalf of the debtors. As stated *supra*, Mr. Backus filed a motion to withdraw as the debtors' attorney on January 20, 2004.

⁶ Ms. Thomas testified that the home was uninsured from July 16, 2003 until July 30, 2003.

firm's bank account.⁷ The bankruptcy administrator complains that the law firm's checks do not clearly denote that the checks are drawn on a trust account as required by the Alabama Rules of Professional Conduct. *See* Defendant's Exhibit 4.

Finally, Mrs. Thomas testified that it was very difficult to reach Mr. Backus by phone and that he often did not return her calls. Yet, Mrs. Thomas testified that she spoke with Mr. Backus numerous times during the pendency of the second chapter 13 case (July 25, 2003 until Backus withdrew on January 20, 2004).

Conclusions of law

A debtor's attorney is required, pursuant to 11 U.S.C. § 329 and Fed. R. Bankr. Proc. 2017, to disclose the compensation paid or agreed to be paid for representing the debtor in bankruptcy. Further, if the compensation is found to be excessive, the court may order such payment disgorged and returned to the estate or to the entity making the payment.

In addition, by filing a petition or other paper, an attorney certifies that to the best of his knowledge, the "allegations and other factual contentions have evidentiary support." Fed. R. Bankr. Proc. 9011(b)(3).

Greentree Postpetition Default

Mrs. Thomas' chief complaint against her lawyer is that he did not adequately address Greentree's allegation that her home mortgage was in default postpetition. Mrs. Thomas persists in the view that she was not in default. However, the evidence leads the court to conclude otherwise.

Greentree's first motion for stay relief, filed in the first chapter 13 case on October 8, 2002, concluded with the entry of a consent order on November 7, 2002 providing for payment of a postpetition default. Similarly, there is evidence of a subsequent postpetition default in the first case caused by the debtors'

⁷ Mr. Backus stated that at the time he wrote the checks to the Clerk and Trustee, he had not yet cashed the money order payable to him from the debtors.

failure to pay the March 2003 installment on time.

Greentree's motion for relief in the second chapter 13 case, as with the first, concluded with the entry of a consent order allowing the debtors an opportunity to cure the postpetition default. Further, in the second case, Mrs. Thomas admits that there was some period in which the home was uninsured.

If, as Mrs. Thomas contends, the default was the result of Greentree's use of her payments to purchase insurance, then why did she agree on every occasion to cure postpetition defaults, either through the trustee or directly? It appears to the court that the defaults necessarily were more than the diversion of her payments for insurance costs. Hence, based upon the evidence before it, the court cannot conclude that the debtors were inadequately represented by Backus & Gil with respect to the debtors' mortgage problems with Greentree.

Failure to Return Telephone Calls

Mrs. Thomas contends that she was not adequately represented because Mr. Backus would not return her calls. Yet Mrs. Thomas testified that she talked to Mr. Backus numerous times during the pendency of the second case alone.

Lawyers have a duty to keep their clients reasonably advised about the status of a case and promptly comply with a client's reasonable request for information. *See Alabama Rules of Professional Conduct*, Rule 1.4. Here, Backus or his staff spoke with the debtor on numerous occasions concerning their oft recurring mortgage problems. The attorney negotiated a consent order in the first case effectively dealing with the alleged default. He counseled dismissal of the first case when the debtors defaulted on the March 2003 payment in violation of the earlier consent order. Similarly, he was endeavoring to conclude Greentree's stay relief request in the second case, and all along, consulting with Mrs. Thomas. Without more, the court cannot conclude that these lawyers failed to keep their client reasonably advised.

Failure of Attorney Checks to Be Designated With the Word “Trust” Or the Like

The Alabama Rules of Professional Conduct provide in pertinent part regarding lawyer trust accounts:

A lawyer shall designate all such trust accounts, whether general or specific, as well as deposit slips and all checks drawn thereon, as either an “Attorney Trust Account,” an “Attorney Escrow Account,” or an “Attorney Fiduciary Account.”

Alabama Rules of Professional Conduct, Rule 1.15(a).

Mr. Backus’ checks to the clerk of court and to the chapter 13 trustee were from money he had received from the debtors. The debtors had paid the money to him for the purpose of paying their filing fees and plan payments. The money was not paid as compensation to Mr. Backus. It follows then that these funds were trust funds in that the attorney served merely as a conduit through which the debtor paid monies to the clerk and the trustee.

The checks are not properly denominated as having been drawn on a trust account as is required by the Alabama Rules of Professional Conduct. Nevertheless, there is no hint that Backus & Gil failed to properly pay over all trust funds to the appropriate parties. While the firm may have committed a technical breach of the rules of conduct, the breach did not result in any loss to these debtors. As a result, this court will not impose sanctions or order disgorgement of fees on this ground. Rather, the court would defer discipline, if any is appropriate, to the Alabama State Bar Association.

Permitting Signing Of Petition, Lists, Schedules, And Statements In Blank

Mr. Backus faxed to the debtors a petition, the lists, the schedules and the statements required for them to file for bankruptcy relief. All of the documents were in blank. He instructed the debtors to sign the documents in the appropriate places and return them to his office. There, the paperwork would be completed and filed. The court finds this practice totally unacceptable and improper.

Reliable, self-disclosed information from debtors is the mainstay of an efficient bankruptcy system. The accuracy of the information elicited by these forms is so crucial to the operation of this court and to the administration of debtor estates that Congress requires the petitions, lists, schedules and statements to be signed under penalty of perjury. Counsel, by instructing his clients to sign these papers in blank, has frustrated the entire purpose of the execution of these papers under oath.

Such action by counsel is sanctionable as a violation of Fed. R. Bankr. Proc. 9011(b). *See* Rule 9011(c). An appropriate sanction is the disgorgement of his fees in the first chapter 13 case.

Conclusion

Having considered the bankruptcy administrator's motion to examine the debtors' transactions with their attorney and the evidence presented at the hearing to consider the same, a separate order will enter consistent with this memorandum opinion sanctioning debtors' counsel and requiring him to pay \$1,300.00 to the Clerk of Court.

Done this 5th day of May, 2004.



Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtors

W. Gail Hughes, Attorney for Debtors

Gary A. Backus, Esq.

Curtis C. Reding, Trustee

Teresa R. Jacobs, Bankruptcy Administrator

Alabama Bar Association

**UNITED STATES BANKRUPTCY COURT
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CAROLYN ROLLAN THOMAS
RICKY A. THOMAS,

Debtors.

ORDER REQUIRING DISGORGEMENT

In accordance with the Memorandum Opinion entered this day, it is

ORDERED that Gary A.C. Backus pay \$1,300.00 to the Clerk of the United States Bankruptcy Court for the Middle District of Alabama. The amount represents the attorney's fee received by Gary A.C. Backus in the chapter 13 case of *In re Thomas*, Case No. 02-32293-DHW.

Done this 5th day of May, 2004.



Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtors

W. Gail Hughes, Attorney for Debtors

Gary A. Backus, Esq.

Curtis C. Reding, Trustee

Teresa R. Jacobs, Bankruptcy Administrator

Alabama Bar Association